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No. \_\_\_\_\_

A. AIDA KELSAW,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,  
a Utah corporation,

Respondent.

Petition For Certiorari From  
The United States Court of Appeals  
For The Ninth Circuit

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the spouse of an injured  
railroad employee may recover for loss  
of consortium under the Federal Employers'  
Liability Act?

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JURISDICTION

The Ninth Circuit entered its judgment in the instant case on September 9, 1982. Petitioner is seeking review pursuant to 28 U.S.C. § 1254(1).

STATUTES

The relevant statutory provisions for purposes of review are as follows:

1. The Federal Employers' Liability Act, 45 U.S.C. § 51:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit

of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22,

1908) [45 U.S.C. §§ 51 et seq.] as the same has been or may hereafter be amended. (Apr. 22, 1908, ch 149, § 1, 35 Stat. 65; Aug. 11, 1939, ch 685, § 1, 53 Stat. 1404.)

2. The Jones Act, 46 U.S.C. § 688:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal

office is located.

(Mar. 4, 1915, ch 153, § 20, 38 Stat. 1185; June 5, 1920, ch 250, § 33, 41 Stat. 1007.)

3. The Death On The High Seas Act,  
46 U.S.C. § 762:

The recovery in such suit shall be fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought. (Mar. 30, 1920, ch 111, § 2, 41 Stat. 537.)

#### STATEMENT OF THE CASE

Petitioner, the wife of an injured railroad employee, brought this action against Defendant for damages due to loss of consortium. Jurisdiction of the Federal Court was invoked pursuant to 28 U.S.C. § 1331. Petitioner's claim is based upon the Federal Employers' Liability

Act (FELA), 45 U.S.C. §§ 51 et seq.

The United States District Court for the District of Oregon dismissed the action pursuant to Rule 12 of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Petitioner's subsequent Motion for Reconsideration was denied.

Petitioner then appealed the District Court's dismissal of her Complaint to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the District Court's judgment.

#### ARGUMENT

Petitioner argues that Congress did not intend to preclude damages under the FELA for loss of consortium. The FELA does not contain explicit language limiting recovery to pecuniary losses. Any such limitation was judicially created

based upon what now are considered to be outmoded objections.

1. Background: The "Roots" of Loss of Consortium.

(a) What constitutes "loss of consortium"?

The concept of "consortium" includes both tangible and intangible elements. The tangible elements consist of support and services of the other spouse, while the intangibles are such items as love, companionship, affection, society, sexual relations, comfort and solace. (See 74 ALR 3d 809.)

(b) Historical basis and current status of recovery for loss of consortium.

In the early 1800's, a husband's right to maintain an action for loss of consortium was recognized and sustained. (See 21 ALR 1519.) The reasoning which

prevailed at the time was that a wife owed a duty to her husband to provide conjugal support and assistance. Therefore, anyone who tortiously impaired her ability to perform such a duty deprived her owner (husband) of the right to his "consortium." In contrast, a wife did not have a corresponding common law cause of action for loss of her husband's consortium, basically because she could not sue in her own name for a personal injury. (See 41 Am Jur 2d, Husband and Wife, § 457.)

A more general objection to allowing recovery for loss of consortium, particularly to the loss of society and companionship, was the incapability of measuring such losses by a pecuniary standard. (See, for example, Michigan Central Railroad Company v. Vreeland, 227 U.S. 59, 73 [1913].) However, this objection is based upon a questionable

foundation because during the same period of time a husband was not denied the right to recover for loss of consortium. In addition, no matter how intangible, such losses were and are undeniably real. Mobil Oil Corporation v. Higginbotham, 436 U.S. 618, 623 (1978). Thus, over time, such objections have been eroded so that currently a cause of action for loss of consortium by a wife has been upheld under common law (e.g. Hitafter v. Argonne Co., 183 F.2d 811 [1950], cert. den. 340 U.S. 852, overruled on other grounds, Smither & Co. v. Coles, 242 F.2d 220 [1957], cert. den. 354 U.S. 914) and is permitted by a clear majority of states. (American Export Lines, Inc. v. Alvez, 446 U.S. 274, 284 fn 11 [1980].)

2. Loss of Consortium Under the FELA.

The text of Section 51 of the

FELA does not state that damages for loss of consortium shall not be permitted, nor does it limit damages to pecuniary losses. The statute allows recovery for injury or death to a railroad employee resulting from a railroad employer's negligence. Specifically, the statute says:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and,

if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908) [45 U.S.C. §§ 51 et seq.] as the same has been or may hereafter be amended. (Emphasis ours)

(a) Early Supreme Court Cases

In 1913, the wife of a deceased railroad employee sued the railroad company under the FELA for the wrongful death of her husband. Michigan Central Railroad v. Vreeland, supra. The Supreme Court held that a railroad employer's liability under the FELA was limited to pecuniary losses. In reaching this result, the Court did not rely upon the express language of the statute, but instead looked to the judicial interpretation given to Lord Campbell's Act. Michigan Central Railroad v. Vreeland, supra at 69. The Court explained that the limitation to pecuniary losses was due directly to the problem of valuation, i.e., that the loss of society and companionship was an "inestimable loss." Michigan Central Railroad v. Vreeland, supra at 71. The Court did not set out a rigid and inflexible rule as to

defining pecuniary losses, but admitted that such a "hard and fast" rule was impossible. Michigan Central Railroad v. Vreeland, supra at 72. The Court primarily seemed to be concerned with the broad latitude of an instruction given to the jury in assessing damages, and also with the lack of evidence on the record as to the loss of service, care and advice suffered by the wife. Michigan Central Railroad v. Vreeland, supra at 73-74.

In 1917, the Supreme Court faced another issue concerning the scope of the FELA. The Court held that the FELA was the exclusive remedy available to employees who suffered injuries while in the employment of interstate railroad carriers. New York Central R.R. Co. v. Winfield, 244 U.S. 147 (1917). (See also, Erie Railroad Co. v. Winfield, 244 U.S. 170 [1917] and New York Central & Hudson River Railroad

Co. v. Tonsellito, 244 U.S. 360 [1917].)

The Court emphasized that the congressional intent behind the FELA was to have a national law providing uniformity across the states for the liability of interstate railroad carriers. New York Central Railroad Co. v. Winfield, supra at 150.

(b) Lower Court Cases

Since these early decisions, the Supreme Court has not readdressed the above issues. More recently, lower courts have been cited as addressing specifically the loss of consortium issue, and such cases have relied upon the above early statements to deny such a cause of action. (e.g., Jess v. Great Northern Railway Co., 401 F.2d 535, 536 [9th Cir. 1968]; Anderson v. Burlington Northern, Inc., 469 F.2d 288 [10th Cir. 1972]; Spinola v. New York Central Railroad, 33 A.D. 2d 74, 305 N.Y.S. 2d 437, 438 [1969]; and Prata

v. National Railroad Passenger Corporation,  
70 A.D. 2d 114, 420 N.Y.S. 2d 276 [1979].)  
However. to demonstrate the lack of clarity and the lack of comprehensiveness of these lower court decisions, they are addressed more specifically below.

In Jess v. Great Northern Railway Company, supra, the Ninth Circuit held that a wife of a railroad employee could not recover for loss of consortium under the FELA after her husband had been denied recovery under the FELA. The Court emphasized the exclusive remedy of the FELA in affirming the dismissal of the case. The Court's opinion is very brief (one page) and does not explain whether res judicata notions precluded the wife's recovery (since her husband previously had been denied relief) or whether it was the particular cause of action, loss of consortium, which prevented recovery.

The Tenth Circuit in Anderson v. Burlington Northern, Inc., supra, also denied recovery for loss of consortium under the FELA, citing the early Supreme Court cases (discussed above) and Jess, supra. The Court described the exclusiveness of the FELA remedy treating an action for loss of consortium as a separate action arising out of state law (even though the widow had brought the case directly under the FELA). Anderson v. Burlington Northern, Inc., supra at 289.

The Supreme Court of the Appellate Division of New York held in Spinola v. New York Central Railroad, supra, that the FELA "confers no cause of action for loss of consortium on the wife of the injured employee," and thus denied the Plaintiff employee's Motion to add his wife as party plaintiff. Spinola v. New York Central Railroad, supra at 437.

This opinion, too, was very brief, dealing with the issue summarily and citing for support Jess, supra.

Finally, in Prata v. National Railroad Passenger Corporation, supra, the Supreme Court of the Appellate Division of New York again denied a wife an action for loss of consortium under the FELA. The Court relied upon the Tonsellito case, supra, and Spinola, supra, as establishing the certainty of this holding and stated that the FELA contained "no provision for loss of consortium." Prata v. National Railroad Passenger Corp., supra at 279.

(c) A Summary

To summarize, the Supreme Court never has held recovery under the FELA to preclude damages for a wife's loss of consortium. What the Court has addressed is the exclusivity of the FELA remedy, thereby preventing state

regulation. Nor has the Supreme Court decided that the express language of the statute, or the congressional intent behind it, precludes such recovery. What the Supreme Court has said is that in 1913, the Act should be limited to pecuniary losses based upon the judicial interpretation of Lord Campbell's Act and the speculative nature of non-pecuniary damages.

Any lower court precedents going beyond the above Supreme Court holdings have a dubious foundation. Cases that rely on the exclusivity of the FELA do not address the issue presented herein, i.e., whether there is recovery for loss of consortium directly under the FELA. In addition, such cases that allegedly do address the issue have generally disposed of the case summarily leaving little by way of analysis or clarity.

3. Loss of Consortium Under the Jones Act, Death on the High Seas Act, and General Maritime Law.

(a) Background: The Jones Act.

Prior to 1915, a seaman did not have a cause of action under general maritime law for the negligence of the master or any member of the crew.<sup>1</sup> Congress responded to this harsh rule by passing the Jones Act, which incorporated by reference the Federal Employer's Liability Act, thus providing an action based on negligence for the injury and wrongful death of a seaman.<sup>2</sup> By the

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1. The Osceola, 189 U.S. 158 (1903).

2. 46 U.S.C. § 688 provides: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring and regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."(Emphasis ours)

incorporation of the FELA, precedent under the Jones Act and maritime law becomes important to the issue presented herein.

(b) Background: Death on the High Seas Act.

In response to another harsh rule under federal maritime law which did not provide recovery for the wrongful death of a non-seaman in the absence of a state or federal statute,<sup>3</sup> Congress enacted the Death on the High Seas Act (hereinafter DOHSA) 46 U.S.C. § 761-768 (1976). The Act provides a remedy for wrongful death occurring beyond the territorial waters of a state, but limits recovery explicitly to pecuniary losses. 46 U.S.C. § 762 (1976).<sup>4</sup>

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3. The Harrisburg, 119 U.S. 199 (1886).

4. 46 U.S.C. § 762 provides: "The recovery in such suit shall be fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought." (Emphasis ours)

The Supreme Court has interpreted the restrictive "pecuniary" language of the statute to preclude damages for "loss of society" under federal maritime law. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978). The Court in arriving at this result stated that there was "a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." Mobil Oil Corp. v. Higginbotham, supra at 625.

(c) General Maritime Law and the "Unseaworthiness" Doctrine.

Despite the Jones Act and DOHSA, harsh rules and anomalies still remained under federal maritime law. (e.g., See Sea-Land Services v. Gaudet, 414 U.S. 573, 576-77 [1974].) Arbitrary distinctions developed depending upon various circumstances. For example, distinctions

were made based upon whether the plaintiff was a seaman versus a non-seaman (such as a longshoreman); whether the injury or death occurred inside or outside of territorial waters; and whether a remedy was provided by state statute. Sea-Land Services v. Gaudet, supra at 576-77. Some of these problems have been addressed in a recent trio of Supreme Court cases starting in 1970.

In Moragne v. States Marine Lines, 398 U.S. 375 (1970), the Supreme Court held that there was a cause of action under federal maritime law for the wrongful death of a non-seaman. This was followed by the Court's decision in Sea-Land Services, Inc. v. Gaudet, supra, which held that the dependents of a deceased longshoreman could recovery damages for loss of consortium under federal maritime law. The Court's analysis in arriving at such a decision

warrants particular attention. The Court rejects the traditional objection discussed in ARGUMENT (2) of this Petition (i.e., that such damages are speculative), as precluding recovery for such losses. As argued herein, the Court noted that a clear majority of states now permit recovery for the loss of society (e.g., love, affection and companionship). In addition, the Court stated that since the 17th Century, juries have assessed damages for loss of consortium to compensate husbands whose wives had been negligently injured. More recently, the Court said juries have been asked to measure loss of consortium suffered by wives whose husbands have been the victims of negligence. Sea-Land Services v. Gaudet, supra at 587-589.

In summary, the Supreme Court based its decision upon the past history of allowing recovery to husbands for loss

of consortium and the more recent changes in the law allowing wives the corresponding cause of action. Petitioner argues that such reasoning is equally applicable to her claim under the FELA. (See discussion infra under ARGUMENT (4) of this Petition.)

- (d) The Current Status of Loss of Consortium Under the Jones Act and Maritime Law.

(1) American Export Lines, Inc., v. Alvez, 446 U.S. 274 (1980). In the last of its recent trio maritime cases, the Supreme Court extends the Gaudet analysis to allow a wife recovery for loss of consortium where the injuries to her husband were non-fatal. Petitioner contends that the Court in Alvez rejects the argument that the Jones Act precludes recovery for loss of consortium, not only under general maritime law, but under the language of the Jones Act as well. Specifically, the Court states that neither DOHSA or the

Jones Acts "embodies an 'established and inflexible' rule here foreclosing recognition of a claim for loss of society by judicially crafted general maritime law." American Export Lines, Inc. v. Alvez, supra at 282. (Emphasis added) The importance of this statement lies with the words "judicially crafted."

If judicially crafted maritime law permits an action for loss of society, would not also judicially crafted interpretations of the Jones Act (via the FELA) permit such an action? To summarize, all of the law previously discussed under the FELA (ergo the Jones Act) has been "judicially crafted," similar to general maritime law. If general maritime law is subject to change, so are the judicial interpretations of the FELA and the Jones Act. The Supreme Court lends supports to this proposition when it stated further in Alvez:

"The Jones Act itself was not the product of careful drafting or attentive review . . .; assuming that the statute bars damages for the loss of society, it does so solely by virtue of judicial interpretation of the Federal Employers' Liability Act . . ." American Export Lines, Inc. v. Alvez, supra at 283.

Finally, in Alvez (like Gaudet), the Court emphasizes the importance of the current prevailing views about compensation for loss of society and directs attention to the majority of states which allow a wife recovery for loss of consortium. Id at 284.

(ii) Application of Alvez.

Since Alvez, the Fifth Circuit has addressed the issue of whether recovery for loss of consortium is permitted under the Jones Act. Cruz v. Hendy Intern Co., 638 F.2d 719 (5th Cir. 1981), in denying such an action, the Court states that the Jones

Act creates an "integrated remedial pattern." Id at 725. Such a statement flies directly into the face of the Supreme Court's statement in Alvez that the Jones Act was "not the product of careful drafting and attentive legislative review." American Export Lines v. Alvez, supra at 283.

Therefore, the Fifth Circuit's impression of the Act, at minimum, deserves skepticism. In addition, the Fifth Circuit relies upon the fact that the Supreme Court in Alvez "distinguishes" one of the Fifth Circuit's prior holdings denying recovery for loss of consortium under the Jones Act.<sup>5</sup> Petitioner contends that the Supreme Court did not "distinguish" such case; it merely cited Ivy as an example of a case which denied recovery under the Jones Act for loss of society due to the judicial interpretation

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5. Ivy v. Security Barge Line, Inc., 606 F.2d 524 (5th Cir. 1979).

of the FELA. Also, the fact that the Supreme Court denied certiorari in the Ivy case, supra, is not dispositive of the specific issue of whether loss of society is permitted under the Jones Act, nor is it dispositive of the issue presented herein. In fact, the only thing that the denial of certiorari is dispositive of is the Ivy case.

4. The "Crux of Petitioner's Argument: Congress did not intend to preclude damages for loss of consortium under the FELA."

The focal points of Petitioner's arguments are as follows:

(a) The language of the FELA does not preclude recovery for loss of consortium.

Congress, in 1910, did not enact a statute expressly limiting the recovery of railroad employees and their dependents to pecuniary losses, nor did Congress

expressly exclude loss of consortium. Congress knows how to sue restrictive language if it chooses to do so. The DOHSA is such an example because Congress expressly stated in the Act that only pecuniary losses could be recovered.

- (b) Congressional intent behind the FELA does not preclude loss of consortium.

When Congress passed the FELA, its primary concern was to establish uniform remedies against interstate railroad carriers for negligence. (See discussion supra p.13.) The state of negligence law at the time did not permit a wife to recover for loss of consortium. Therefore, Congress most likely did not contemplate the above issues when it passed the FELA. What Congress did contemplate was that railroad employees should recover for a railraod employer's negligence and that no broader remedies than those available

at common law for negligence should be permitted. This intent does not preclude recovery for loss of consortium today. To the contrary, such intent keeps within the intent of uniformity since it provides for flexibility as the law of negligence develops over time. Currently, loss of consortium may be the direct and natural consequence of employer negligence. No longer do objections to its lack of pecuniary measurement prevent recovery for such losses. Therefore, it is well within the remedies for negligence contemplated under the FELA.

- (c) To the extent, if any, that prior "judicially crafted" case law conflicts with allowing recovery for loss of consortium, it should be changed or clarified.

As stated previously in this Petition, recovery for loss of consortium under the FELA has not been directly addressed by the Supreme Court. Rather,

early cases spoke to the exclusivity of the law, thereby preventing state regulation. The only case which seems to, at least superficially, conflict with permitting such recovery is the Vreeland case decided in 1913. Arguably, Vreeland reflected the state of negligence law at the time and, therefore, it correctly denied recovery for non-pecuniary losses.

However, now a wife has a cause of action at common law for loss of consortium in a majority of the states. Other objections regarding the speculative nature of such damages have been rejected.

After all these years and changes, the Court should address this issue. To the extent Vreeland is in conflict with allowing damages for loss of consortium, it should be overruled.

#### CONCLUSION


In conclusion, and based upon the foregoing argument, Petitioner respectfully

requests the Court to grant review of  
her claim.

Respectfully submitted,

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By



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